No. 80-1084

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

MOUNTAIN STATES LEGAL FOUNDATION, a nonprofit corporation, on behalf of its members who are citizens of the State of Colorado; THE FOLLOWING MEMBERS OF THE SENATE AND ~~HOUSE OF~~ REPRESENTATIVES OF THE STATE OF COLORADO IN THEIR RESPECTIVE OFFICIAL CAPACITIES AS INDIVIDUALLY ELECTED LEGISLATORS OF THE STATE OF COLORADO; Senator FRED E. ANDERSON; Senator DAN D. NOBEL; Senator L. DUANE WOODARD; Senator DONALD A. SANDOVAL; Representative ROBERT F. BURFORD; Representative JOHN G. HAMLIN; Representative W. H. (Bill) BECKER; Representative BOB LEON KIRSCHT; Representative CARL B. BLEDSOE; Representative C. MICHAEL CALLIHAN; Senator RALPH A. COLE; Representative FRANK DE FILIPPO; Representative STEVEN J. DURHAM; Representative CARL H. GUSTAFSON; Representative WILLIAM F. HILSMEIER; Senator DON MACMANUS; Representative JOHN R. MCELDERRY; Representative RAY POWERS; Representative FRANK H. RANDALL; Representative PAUL D. SCHAUER; Representative BEV SCHERLING; Representative JAMES M. SHEPARD; Representative CARL E. SHOWALTER; Representative A. J. (Mick) SPANO; Representative KATHY SPELTS; Representative NICK THEOS; and the STATE OF COLORADO *ex rel.* Mountain States Legal Foundation,

Petitioners,

vs.

DOUGLAS M. COSTLE, in his official capacity as Administrator of the UNITED STATES ENVIRONMENTAL PROTECTION AGENCY; ROGER L. WILLIAMS in his official capacity as Regional Administrator of Region VIII of the UNITED STATES ENVIRONMENTAL PROTECTION AGENCY; the UNITED STATES ENVIRONMENTAL PROTECTION AGENCY; and the STATE OF COLORADO *ex rel.* J. D. MACFARLANE,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION IN SUPPORT OF PETITIONERS MOUNTAIN STATES LEGAL FOUNDATION, ET AL., AND BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION IN SUPPORT OF PETITIONERS MOUNTAIN STATES LEGAL FOUNDATION, ET AL.

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This motion of Pacific Legal Foundation to file the annexed brief amicus curiae is respectfully made pursuant to Supreme Court Rule No. 36. Petitioners Mountain States Legal Foundation, *et al.*, have consented to the filing of this brief. Counsel for the Department of Justice has refused consent on behalf of federal respondents, however, the Solicitor General has consented on behalf of the United States. The State of Colorado *ex rel.* J. D. MacFarlane is of the opinion that this case is moot and has, therefore, declined to consent to the filing of this brief. The written consents of petitioners Mountain States Legal Foundation, *et al.*, and of the Solicitor General have been lodged with the Clerk of this Court.

PLF is a nonprofit, tax-exempt corporation organized and existing under the laws of California for the purpose of engaging in litigation in matters effecting the broad public interest. Policy for PLF is set by a Board of Trustees composed of concerned citizens, the majority of whom are attorneys. The Board evaluates the merits of any contemplated legal action and authorizes such legal action only where the Foundation's position has broad support within the general community. The PLF Board has authorized the filing of this brief.

PLF is a party to similar litigation currently pending before this Court (*Pacific Legal Foundation, et al. v. Costle, et al.*, No. 80-828 (filed Nov. 1980)), and actively participated in prior litigation on similar issues (*Brown v. Environmental Protection Agency*, 521 F.2d 827 (9th Cir. 1975); *Environmental Protection Agency v. Brown*, 431 U.S. 99 (1977); *Brown v. Environmental Protection*

Agency, 566 F.2d 665 (9th Cir. 1977)). Thus, PLF believes that due to its unique expertise in this area and its public interest perspective, it can provide this Court with additional argument regarding the issues in this case.

Because of the national significance of the case, Pacific Legal Foundation feels that the present parties cannot adequately represent the interests of the public while at the same time representing their own localized interests.

For the foregoing reasons, Pacific Legal Foundation requests that this motion to file the annexed brief amicus curiae be granted.

Respectfully submitted,

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INTEREST OF AMICUS

The interest of amicus curiae is set out in the preceding motion for leave to file this brief.

OPINION BELOW

The opinion of the United States Court of Appeals for the Tenth Circuit is reported at 630 F.2d 754 (1980).

STATEMENT OF THE CASE

Amicus adopts petitioners' statement of the case set out in the petition for writ of certiorari.

SUMMARY OF ARGUMENT

1. The overzealous administration of the Clean Air Act by the Environmental Protection Agency (EPA) brings before this Court the question of whether, under Article 4, Section 4 of, and the Tenth Amendment to, the Federal Constitution, the states are free to enact or refuse to enact their own laws. Amicus asks this Court to note that in prior litigation concerning similar issues, EPA conceded to this Court the necessity of removing from its regulations any requirement that states adopt laws or regulations.

2. The guaranty to the states of a republican form of government and the Colorado Constitution, taken together, grant Colorado State Legislators standing to litigate claims based upon the sovereignty of the State of Colorado.

ARGUMENT

I

THE ACTIONS OF THE ENVIRONMENTAL PROTECTION AGENCY UNCONSTITUTIONALLY INTERFERE WITH THE LEGISLATIVE PROCESSES OF STATE GOVERNMENT

The petition for writ of certiorari in this case asks this Court to hear a challenge to actions of EPA that alter the fundamental structure of Colorado state government. The present controversy is rooted in Colorado's participation in the federal Clean Air Act program. 42 U.S.C. §§ 7401, *et seq.* It seems that Colorado's voluntary participation in the program did not measure up to the desires of EPA. Thus, EPA *ordered* the State Legislature to enact new laws and when the Legislature failed to keep pace with the schedule *ordered* by EPA bureaucrats, the State of Colorado was subjected to severe punitive sanctions.

That EPA would take action so blatantly repugnant to the constitutional principles of federalism should come as a shock and surprise to this Court. In 1977, in litigation concerning nearly identical issues, EPA conceded to this Court the necessity of removing from its regulations requirements for states to adopt legislation or regulations. *Environmental Protection Agency v. Brown,* 431 U.S. 99, 103 (1977). Apparently, EPA believes that it is not bound by its statements and promises to this Court.

The statements of EPA to this Court in 1977 were the result of litigation commenced in California, Maryland, Virginia, and Washington, D.C. *Id.* at 102. The California litigation was based on petitions for review of EPA regu-

lations filed by 208 parties including the State of California and Pacific Legal Foundation. *See Brown v. Environmental Protection Agency,* 521 F.2d 827, 828 (9th Cir. 1975), *vacated and remanded for consideration of mootness, Environmental Protection Agency v. Brown,* 431 U.S. 99 (1977), *reinstated in part, Brown v. Environmental Protection Agency,* 566 F.2d 665 (9th Cir. 1977). Some of the regulations at issue in that case

> "specifically directed the State of California to undertake those tasks assigned to it, to report its compliance to the Agency, and, in the case of the inspection and maintenance program, to report the date by which the State would recommend any needed legislation and to submit '[a] signed statement from the Governor and State Treasurer identifying the sources and amounts of funds needed for the program' and the 'text of needed legislation' if existing legislation does not authorize the funds which the program will require." *Brown v. Environmental Protection Agency,* 521 F.2d at 830.

To enforce these regulations, EPA claimed the power to: impose a receivership on state functions; hold state officials in civil contempt with substantial daily fines until compliance was secured; and require the state to allocate funds from its budget to finance the EPA mandated projects. *Id.* at 831.

In holding that the Clean Air Act simply did not authorize the attempts of EPA to force California to adopt laws, the United States Court of Appeals for the Ninth Circuit stated:

> "Our holding recognizes that the pollution-creating activities of the State of California, its instrumen-

> talities and subdivisions, and its municipalities, are subject to valid regulations promulgated by the Administrator. We also recognize that the State must avoid impeding any enforcement of valid regulations which the Administrator undertakes. We reject, however, the view that the Clean Air Act authorizes the imposition of sanctions against the State for its failure to administer and enforce a system of regulations promulgated by the Administrator which are designed to control the pollution-creating activities of the citizens of the State and others subject to its jurisdiction. *Tersely put, the Act, as we see it, permits sanctions against a state that pollutes the air, but not against a state that chooses not to govern polluters as the Administrator directs.*" *Id.* at 832 (emphasis added).

Although the Court of Appeals struck down EPA's regulations as not authorized by the Clean Air Act, the court noted:

> "Enough has been said to demonstrate why we do not feel compelled by the language of the Act to reach the serious constitutional issues which the Administrator's interpretation raises. Validation of our interpretation, however, requires that we set forth these issues and, by suggesting our evaluation of them, reveal the intensity of our desire to avoid confronting them." *Id.* at 837.

In support of the constitutionality of its actions, EPA argued that the regulation of air pollution, regardless of its source, is a proper exercise of congressional power under the Commerce Clause. Citing *United States v. California,* 297 U.S. 175 (1936)—holding that state owned railroads were subject to federal safety regulations—EPA

contended that since the State of California built roads, licensed vehicles, and made traffic laws, regulations ordering the state to adopt certain air pollution laws was proper. *Brown v. Environmental Protection Agency,* 521 F.2d at 838. While recognizing the plenary power of Congress to regulate commerce, the Court of Appeals noted that there is a significant distinction between regulation of a state's *participation* in economic activity and regulation of a state's *governance* of that same activity. *Id.* at 838.

> "The *power of states over commerce* has no more been recognized as *commerce* than has the *power of Congress which is derived from the Commerce Clause.* Each find their source in the Constitution. Both are of the same family and genus, although not of the same species. The power of the states must yield to Federal power in order to effectuate Federal supremacy, not because the power of the state is commerce.
>
> "To treat the governance of commerce by the states as within the plenary reach of the Commerce Power would in our opinion represent such an abrupt departure from previous constitutional practice as to make us reluctant to adopt an interpretation of the Clean Air Act which would force us to confront the issue. Such treatment, for example, would authorize Congress to direct the states to regulate any economic activity that affects interstate commerce in any manner Congress sees fit. . . . A Commerce Power so expanded would reduce the states to puppets of a ventriloquist Congress. We will not attribute to Congress any such intent unless it is expressed unequivocally." *Id.* at 839 (emphasis in original).

On certiorari to this Court, EPA backed down from its radical position.

> "[T]he federal parties have . . . not merely renounced an intent to pursue certain specified regulations; they now appear to admit that those remaining in controversy are invalid unless modified in certain respects:
>
> > 'The Administrator . . . concedes the necessity of removing from the regulations all requirements that the States submit legally adopted regulations; the [Administrator's] regulations contain no requirement that the State adopt laws.' Brief for Federal Parties 20 n 14.
>
> "The federal parties' position now appears to be that, while the challenged transportation plans do not require the enactment of state *legislation,* they do now contain, and must be modified to eliminate, certain requirements that the State promulgate *regulations.* See Reply Brief for Federal Parties 14 n 22." *Environmental Protection Agency v. Brown,* 431 U.S. at 103 (emphasis in original).

As a result of this concession by EPA, this Court vacated the judgment of the Court of Appeals and remanded the case for consideration of mootness. *Id.* at 104.

When the Court of Appeals reconsidered the case pursuant to this Court's order, it had not only the amended regulations of EPA to consider but also the 1977 amendments to the Clean Air Act which are before this Court in the instant action. Although EPA amended its regulations pursuant to its promise to this Court, the regulations still required the State of California to implement a vehicle inspection and maintenance program. The Court of Appeals found no substantive distinction between the original regu-

lation and the amended regulation since both purported to require the state to govern in a particular manner. *Brown v. Environmental Protection Agency,* 566 F.2d at 668-70. The Court of Appeals also rejected EPA's argument that California—as a builder of roads—could be regulated as an indirect source of pollution under the 1977 amendments to the Clean Air Act. *Id.* at 669. The court further noted that had it been the intent of Congress to regulate states as indirect sources of pollution, the constitutionality of the legislation would be seriously in question. *Id.* at 670.

Although EPA admitted to this Court the necessity of removing from its regulations the requirement that states adopt legislation or regulations—it did not in fact do so. Rather, EPA merely removed the *words* "legislation" and "regulation" from its rules but continued to require affirmative action by the states which the states could only comply with by enacting legislation or promulgating regulations. The Ninth Circuit correctly found the new EPA regulations to create a distinction without a difference. *See id.* at 668-79. In spite of the refusal of the Ninth Circuit to sanction its tyrannical grab for power, and in spite of its promises to this Court, EPA once again claims the authority to *order* a state to enact legislation in accordance with a schedule *ordered* by EPA bureaucrats. Amicus urges this Court to grant the petition in order to reaffirm the proposition that ours is a federal system of government and to prevent the reduction of "the states to puppets of a ventriloquist Congress." *Brown v. Environmental Protection Agency,* 521 F.2d at 839.

II

STATE LEGISLATORS HAVE STANDING TO LITIGATE CLAIMS ARISING UNDER THE TENTH AMENDMENT TO THE FEDERAL CONSTITUTION

Amicus is anxious for this Court to dispel the myth that states are the only proper parties to litigate claims arising under the Tenth Amendment to the Federal Constitution. The origin of this currently popular myth is somewhat of a mystery since it finds no support in the decisions of this Court. For example, in *Charles C. Steward Machine Co. v. Davis,* 301 U.S. 548 (1937), plaintiff, an Alabama corporation, brought suit to recover unemployment insurance taxes paid under the Federal Social Security Act claiming, *inter alia,* that the tax, with its 90% credit for employers in states with state created unemployment compensation funds, coerced states into enacting laws in violation of the Tenth Amendment. Although this Court held the tax to be a proper exercise of the power of Congress to tax and spend (U.S. Const., Art. 1, § 8), this Court did allow plaintiff, a corporation, to litigate a claim based on the sovereignty of the State of Alabama even though the state was not a party to the action (*Steward Machine,* 301 U.S. at 585-99). *Steward Machine* therefore demonstrates that the question of standing to litigate claims arising under the Tenth Amendment is not resolved by the simplistic solution of looking at the caption to see whether a state is a party to the suit.

In order to establish standing, the petitioners must demonstrate that they have or will suffer injury in fact and that the injury is to an interest that is arguably within

the zone of interest sought to be protected by the statute or the constitutional guarantee in question. *United States v. Students Challenging Regulatory Agency Procedures (SCRAP)*, 412 U.S. 669, 686 (1973); *Association of Data Processing Service Organizations, Inc. v. Camp*, 397 U.S. 150, 153 (1970). The fact that many suffer the same injury is of no legal consequence. *SCRAP*, 412 U.S. at 687; *see Baker v. Carr*, 369 U.S. 186, 204-08 (1962). In the instant action, the named members of the Colorado State Legislature suffer direct injury in fact as a result of the unconstitutional actions of EPA. The Federal Constitution reserves to the states the police power (U.S. Const., Amend. X) and requires the states to exercise that power through a republican form of government (U.S. Const., Art. 4, § 4). By state constitution, all legislative power in Colorado is vested in the State Legislature. Colo. Const., art. III and art. V, § 1. Thus, in Colorado the primary beneficiaries of the Reserved Powers Clause of the Federal Constitution are the members of the Colorado State Legislature and any intrusion upon the sovereignty of the state is an intrusion upon the state and federal constitutionally guaranteed powers of these state legislators.

CONCLUSION

Despite the consistent refusal of the federal courts to uphold the attempts of EPA to order states to govern in a particular manner, EPA has once again attempted to strip the last vestiges of sovereignty from the states. These unconstitutional actions of EPA were challenged in a timely manner by members of the Colorado State Legislature and a public interest group whose members, supporters, and contributors are citizens of the State of Colorado. All of these petitioners, therefore, suffer direct injury in fact from the unconstitutional actions of EPA. In order to ensure that the earlier promise of EPA to this Court that the agency would remove from its regulations any requirement for states to adopt laws or regulations is not forsworn, amicus urges this Court to grant the petition.

Respectfully submitted,

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